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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-20.

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND MOTION FOR DISCLOSURE.

LEON H. KLINE,
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PETITION FOR REHEARING AND MOTION FOR DISCLOSURE.

Petitioner prays that this Court grant rehearing of its Order of October 12, 1971, denying the Petition for Writ of Certiorari. In the alternative, petitioner requests that the Court order the Solicitor General to file a memorandum containing information after the manner of the requirement of the Court's order in *Black v. United States*, 384 U. S. 983 (1966), and that the Court, pending receipt of the memorandum, hold in abeyance its determination of this petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

The intervening circumstance which warrants rehearing is the information obtained by one of petitioner's counsel, as appears from Exhibit A attached hereto as an appendix, after the denial of the writ herein, justifying a belief that in the course of illegal electronic surveillance conducted by government agents, the voice of petitioner Alo had been overheard, and further justifying a belief that the government deliberately and purposefully delayed the trial of the petitioner Alo after the secret indictment against him in 1966, and caused his re-indictment in 1969 in order to avoid disclosing that it had engaged in the extensive illegal electronic surveillance.

The Secret Indictment of 1966.

As set out in the Petition for Writ of Certiorari (pp. 14-16, 24-27), the government has refused to acknowledge the existence of the secret indictment. This is also true of the government's Brief in Opposition. In adopting this position, the government has both side-stepped its responsibility and gained an advantage. Thus, one of the factors the district court considered significant, in weighing whether a violation of petitioner's right to a speedy trial occurred, was the *reason* for the delay, but the district court found that "[d]efendant has not shown that the reason for the delay in prosecution was unworthy, despite unsubstantiated allegations to the effect that defendant was indicted on the same charges secretly in 1966." (Pet., 14a). The Court of Appeals, which assumed *arguendo* that there was a 1966 indictment, acted on the assumption that the superseding indictment was filed "for no apparent purpose other than to update the earlier one" (Pet., 7a; 439 F. 2d at 755), a reason which hardly comports with an

"unworthy" purpose. But there was a 1966 indictment and the purpose of the suppression of that indictment and the trial delay is a clear example of prosecutorial misconduct and of prejudice to the petitioner. A purposeful and oppressive delay is decisive: *Pollard v. United States*, 352 U. S. 354, 361 (1957). Indeed, the source and reasons for the delay are always relevant and critical considerations. See *United States v. Simmons*, 338 F. 2d 804, 807 (2d Cir. 1964); see the concurring opinion of Mr. Justice Brennan in *Dickey v. Florida*, 398 U. S. 30, 39, 47-56 (1970).

The Electronic Surveillance.

Prior to the trial, a motion was made on behalf of the petitioner seeking the discovery of electronic eavesdropping. Judge Weinfeld stated, "The question of the Alderman [*Alderman v. United States*, 394 U. S. 165 (1965)] obligation of the United States Attorney is there, and I am sure he will comply with his obligations under that decision." (Transcript of the Hearing of February 3, 1970, pp. 3-4; Appendix filed in the Court of Appeals, pp. 3-4). Subsequently, at the trial the Assistant United States Attorney made the following statement which was then accepted by counsel for petitioner:

> "I made the appropriate inquiries with the organized crime section of the Department of Justice, who then made the appropriate inquiries of all the other agencies, the FBI, and the Internal Revenue Service and Post Inspectors, et cetera, and I have been informed by these people that Mr. Alo was not the subject of any electronic surveillance or any overheard conversations. I am authorized to represent that to the Court." (Trial Transcript, p. 283; Appendix filed in the Court of Appeals, p. 231.)

The information obtained after the order of this Court denying the writ, on October 12, 1971, supports a belief that the government's trial counsel did not have all the facts in his possession. See affidavit included in the appendix hereto as Exhibit A.

CONCLUSION.

For the foregoing reasons, petitioner prays that rehearing be granted of the petition for the writ. In the alternative, petitioner prays for an order directing the Solicitor General to make disclosure, first, concerning the reasons for the suppression of the 1966 indictment and the delay of the trial until the second indictment of the petitioner and, second, concerning electronic surveillance coextensively with that required in *Black v. United States*, 384 U. S. 983 (1966), and retaining jurisdiction pending the disclosure.

Respectfully submitted,

LEON H. KLINE,
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Counsel for Petitioner.

Certificate.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

LEON H. KLINE

APPENDIX.

Exhibit A.

IN THE

SUPREME COURT OF THE UNITED STATES

71-20.

VINCENT ALO,

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v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT.

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

JAY GOLDBERG, being duly sworn, deposes and says:

I was the trial attorney for Vincent Alo, petitioner herein. I was also of counsel in the preparation of his brief to the United States Court of Appeals for the Second Circuit from his conviction in the United States District Court in the Southern District of New York. Further, I was co-counsel for petitioner in this Court when his petition for a Writ of Certiorari was filed on July 2, 1971, which was denied on October 12, 1971.

On January 26, 1970, before the United States District Court, Southern District of New York, I filed on behalf of

the petitioner motion papers setting forth several demands for relief, one of which was stated as follows:

> "Requiring the Government to state whether eavesdropping was used in its pre-indictment investigation and if it were, then defendant should be furnished with the exact times and exact places of said use, the parties to the conversations so recorded, as well as the transcripts of any recordings to which he has standing to object, and same should be made available only to the defense and not to the public."

When the pre-trial motion was argued before the District Court the following took place:

> "MR. ZIRIN: No, it sought discovery and inspection. We do not contend that it is the same except to the extent that this motion seeks the discovery of electronic eavesdropping, which is in the nature of discovery and inspection, which was not brought the first time.
>
> MR. GOLDBERG: I will defer that to the trial court. The question of the Alderman obligation of the United States Attorney is there, and I am sure he will comply with his obligations, under that decision. What bothers me is that I have made motions which raise——"

At the trial Government counsel stated the following:

> "MR. NAFTALIS: May I put two matters on the record? Prior to trial Mr. Goldberg made a motion for the government to disclose whether or not Mr. Alo had been the subject of any wiretapping or electronic surveillance as required under Alderman against the United States.
>
> I made the appropriate inquiries with the organized crime section of the Department of Justice, who

then made the appropriate inquiries of all the other agencies, the FBI, and the Internal Revenue Service and Post Inspectors, et cetera, and I have been informed by these people that Mr. Alo was not the subject of any electronic surveillance or any overheard conversations. I am authorized to represent that to the Court."

At the trial (p. 153) the following testimony occurred:

"Q. (Prosecutor) What individuals, if any, was the SEC looking into to see whether or not they were undisclosed principals?"

"A. (SEC Attorney) Mr. Vincent Alo and Mr. Gerardo Catina, the two of them."

After the petition for a writ of certiorari in the above entitled cause was denied on October 12, 1971, I learned that the secret indictment returned against petitioner in 1966 was not proceeded with by the Government because, among other reasons, the Government did not wish to disclose the existence of illegal "bugging" and wiretapping in Alvin Malnik's law office in Miami Beach, Florida. Also I have reason to believe there were other places in New Jersey and Florida where the Government by illegal electronic surveillance overheard statements of petitioner and about petitioner.

JAY GOLDBERG.

Sworn to before me this 1st day of November, 1971.

FRANCES B. DOLAN,
NOTARY PUBLIC, State of New York,
No. 03-0980255,
Qualified in Bronx County,
Commission Expires March 30, 1973.